

By: Elkins, et al. (Senate Sponsor - Williams) H.B. No. 1394
(In the Senate - Received from the House April 24, 2003;
April 25, 2003, read first time and referred to Committee on
Business and Commerce; May 8, 2003, reported favorably by the
following vote: Yeas 8, Nays 0; May 8, 2003, sent to printer.)

A BILL TO BE ENTITLED
AN ACT

relating to a revision of the general provisions of the Uniform
Commercial Code.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 1, Business & Commerce Code, is amended
to read as follows:

CHAPTER 1. GENERAL PROVISIONS

SUBCHAPTER A. GENERAL PROVISIONS [~~SHORT TITLE, CONSTRUCTION,
APPLICATION AND SUBJECT MATTER OF THE TITLE~~]

Sec. 1.101. SHORT TITLES [~~TITLE~~]. (a) This title may be
cited as the Uniform Commercial Code.

(b) This chapter may be cited as Uniform Commercial
Code--General Provisions.

Sec. 1.102. SCOPE OF CHAPTER. This chapter applies to a
transaction to the extent that it is governed by another chapter of
this title.

Sec. 1.103. CONSTRUCTION OF TITLE TO PROMOTE ITS PURPOSES
AND POLICIES; APPLICABILITY OF SUPPLEMENTAL PRINCIPLES OF LAW.
[~~PURPOSES; RULES OF CONSTRUCTION; VARIATION BY AGREEMENT.~~] (a)
This title must [shall] be liberally construed and applied to
promote its underlying purposes and policies, which[-

[(b) ~~Underlying purposes and policies of this title~~] are:
(1) to simplify, clarify and modernize the law
governing commercial transactions;

(2) to permit the continued expansion of commercial
practices through custom, usage and agreement of the parties; and

(3) to make uniform the law among the various
jurisdictions.

(b) ~~[(c) The effect of provisions of this title may be
varied by agreement, except as otherwise provided in this title and
except that the obligations of good faith, diligence,
reasonableness and care prescribed by this title may not be
disclaimed by agreement but the parties may by agreement determine
the standards by which the performance of such obligations is to be
measured if such standards are not manifestly unreasonable.~~

~~[(d) The presence in certain provisions of this title of the
words "unless otherwise agreed" or words of similar import does not
imply that the effect of other provisions may not be varied by
agreement under Subsection (c).~~

~~[(e) In this title unless the context otherwise requires
(1) words in the singular number include the plural,
and in the plural include the singular;
(2) words of the masculine gender include the
feminine and the neuter, and when the sense so indicates words of
the neuter gender may refer to any gender.~~

~~[Sec. 1.103. SUPPLEMENTARY GENERAL PRINCIPLES OF LAW
APPLICABLE.] Unless displaced by the particular provisions of
this title, the principles of law and equity, including the law
merchant and the law relative to capacity to contract, principal
and agent, estoppel, fraud, misrepresentation, duress, coercion,
mistake, bankruptcy, or other validating or invalidating cause
shall supplement its provisions.~~

Sec. 1.104. CONSTRUCTION AGAINST IMPLIED [~~IMPLICIT~~]
REPEAL. This title being a general act [body of law] intended as a
unified coverage of its subject matter, no part of it shall be
deemed to be impliedly repealed by subsequent legislation if such
construction can reasonably be avoided.

Sec. 1.105. [~~TERRITORIAL APPLICATION OF THE TITLE; PARTIES'~~

~~POWER TO CHOOSE APPLICABLE LAW. (a) Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this title applies to transactions bearing an appropriate relation to this state.~~

~~[(b) Where one of the following provisions of this title specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified:~~

~~[Rights of creditors against sold goods. Section 2.402.~~

~~[Applicability of the chapter on Leases. Sections 2A.105 and 2A.106.~~

~~[Applicability of the chapter on Bank Deposits and Collections. Section 4.102.~~

~~[Governing law in the chapter on Funds Transfers. Section 4A.507.~~

~~[Letters of Credit. Section 5.116.~~

~~[Applicability of the chapter on Investment Securities. Section 8.110.~~

~~[Law governing perfection, the effect of perfection or nonperfection, and the priority of security interests and agricultural liens. Sections 9.301-9.307.~~

~~[(c) If a transaction that is subject to this title is a "qualified transaction," as defined in Section 35.51 of this code, then except as provided in Subsection (b) of this section, Section 35.51 governs the effect of an agreement by the parties that the law of a particular jurisdiction governs an issue relating to the transaction or that the law of a particular jurisdiction governs the interpretation or construction of an agreement relating to the transaction or a provision of the agreement.~~

~~[Sec. 1.106. REMEDIES TO BE LIBERALLY ADMINISTERED. (a) The remedies provided by this title shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this title or by other rule of law.~~

~~[(b) Any right or obligation declared by this title is enforceable by action unless the provision declaring it specifies a different and limited effect.~~

~~[Sec. 1.107. WAIVER OR RENUNCIATION OF CLAIM OR RIGHT AFTER BREACH. Any claim or right arising out of an alleged breach can be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party.~~

~~[Sec. 1.108.] SEVERABILITY. If any provision or clause of this title or its application [thereof] to any person or circumstance [circumstances] is held invalid, the [such] invalidity does [shall] not affect other provisions or applications of this [the] title which can be given effect without the invalid provision or application, and to this end the provisions of this title are [declared to be] severable.~~

Sec. 1.106. USE OF SINGULAR AND PLURAL; GENDER. In this title, unless the statutory context otherwise requires:

(1) words in the singular number include the plural, and those in the plural include the singular; and

(2) words of any gender also refer to any other gender.

Sec. 1.107 [1.109]. SECTION CAPTIONS. Section captions are parts of this title.

Sec. 1.108. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This title modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. Section 7001 et seq.) but does not modify, limit, or supersede Section 101(c) of that Act (15 U.S.C. Section 7001(c)) or authorize electronic delivery of any of the notices described in Section 103(b) of that Act (15 U.S.C. Section 7003(b)).

SUBCHAPTER B. GENERAL DEFINITIONS AND PRINCIPLES OF INTERPRETATION

3-1 Sec. 1.201. GENERAL DEFINITIONS. (a) Unless the context
 3-2 otherwise requires, words or phrases defined in this section, or in
 3-3 the additional definitions contained in other chapters of this
 3-4 title that apply to particular chapters or parts thereof, have the
 3-5 meanings stated.

3-6 (b) Subject to [additional] definitions contained in other
 3-7 [the subsequent] chapters of this title that apply [which are
 3-8 applicable] to particular [specific] chapters or parts
 3-9 [subchapters] thereof[, and unless the context otherwise requires,
 3-10 in this title]:

3-11 (1) "Action," in the sense of a judicial proceeding,
 3-12 includes recoupment, counterclaim, set-off, suit in equity, and any
 3-13 other proceeding ~~[proceedings]~~ in which rights are determined.

3-14 (2) "Aggrieved party" means a party entitled to pursue
 3-15 ~~[resort to]~~ a remedy.

3-16 (3) "Agreement," as distinguished from "contract,"
 3-17 means the bargain of the parties in fact, as found in their language
 3-18 or inferred ~~[by implication]~~ from other circumstances, including
 3-19 course of performance, course of dealing, or usage of trade ~~[or~~
 3-20 course of performance] as provided in Section 1.303 ~~[this title~~
 3-21 ~~(Sections 1.205 and 2.208)]~~. ~~[Whether an agreement has legal~~
 3-22 ~~consequences is determined by the provisions of this title, if~~
 3-23 ~~applicable, otherwise by the law of contracts (Section 1.103).~~
 3-24 ~~(Compare "Contract".)]~~

3-25 (4) "Bank" means a [any] person engaged in the
 3-26 business of banking and includes a savings bank, savings and loan
 3-27 association, credit union, and trust company ~~[solely for the~~
 3-28 ~~purposes of Sections 3 and 4 of this Act includes any depository~~
 3-29 ~~institution as defined by federal law].~~

3-30 (5) "Bearer" means a [the] person in possession of a
 3-31 negotiable ~~[an]~~ instrument, document of title, or certificated
 3-32 security that is payable to bearer or indorsed in blank.

3-33 (6) "Bill of lading" means a document evidencing the
 3-34 receipt of goods for shipment issued by a person engaged in the
 3-35 business of transporting or forwarding goods~~[, and includes an~~
 3-36 ~~airbill. "Airbill" means a document serving for air transportation~~
 3-37 ~~as a bill of lading does for marine or rail transportation, and~~
 3-38 ~~includes an air consignment note or air waybill].~~

3-39 (7) "Branch" includes a separately incorporated
 3-40 foreign branch of a bank.

3-41 (8) "Burden of establishing" a fact means the burden
 3-42 of persuading the trier ~~[triers]~~ of fact that the existence of the
 3-43 fact is more probable than its nonexistence ~~[non-existence]~~.

3-44 (9) "Buyer in ordinary course of business" means a
 3-45 person that buys goods in good faith, without knowledge that the
 3-46 sale violates the rights of another person in the goods, and in the
 3-47 ordinary course from a person, other than a pawnbroker, in the
 3-48 business of selling goods of that kind. A person buys goods in the
 3-49 ordinary course if the sale to the person comports with the usual or
 3-50 customary practices in the kind of business in which the seller is
 3-51 engaged or with the seller's own usual or customary practices. A
 3-52 person that sells oil, gas, or other minerals at the wellhead or
 3-53 minehead is a person in the business of selling goods of that kind.
 3-54 A buyer in ordinary course of business may buy for cash, by exchange
 3-55 of other property, or on secured or unsecured credit, and may
 3-56 acquire goods or documents of title under a preexisting
 3-57 ~~[pre-existing]~~ contract for sale. Only a buyer that takes
 3-58 possession of the goods or has a right to recover the goods from the
 3-59 seller under Chapter 2 may be a buyer in ordinary course of
 3-60 business. "Buyer in ordinary course of business" does not include a
 3-61 [A] person that acquires goods in a transfer in bulk or as security
 3-62 for or in total or partial satisfaction of a money debt ~~[is not a~~
 3-63 ~~buyer in ordinary course of business]~~.

3-64 (10) "Conspicuous," with reference to a term, means so
 3-65 written, displayed, or presented that a reasonable person against
 3-66 which it is to operate ought to have noticed it. Whether a term is
 3-67 "conspicuous" or not is a decision for the court. Conspicuous terms
 3-68 include the following:

3-69 (A) a heading in capitals equal to or greater in

size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and

(B) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language[~~— A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: Non-Negotiable Bill of Lading) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous". Whether a term or clause is "conspicuous" or not is for decision by the court.~~].

(11) "Consumer" means an individual who enters into a transaction primarily for personal, family, or household purposes.

(12) "Contract," as distinguished from "agreement," means the total legal obligation that ~~[which]~~ results from the parties' agreement as determined ~~[affected]~~ by this title as supplemented by ~~[and]~~ any other applicable laws ~~[rules of law]~~. ~~[(Compare "Agreement".)]~~

(13) ~~[(12)]~~ "Creditor" includes a general creditor, a secured creditor, a lien creditor and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity and an executor or administrator of an insolvent debtor's or assignor's estate.

(14) ~~[(13)]~~ "Defendant" includes a person in the position of defendant in a ~~[cross-action or]~~ counterclaim, cross-claim, or third-party claim.

(15) ~~[(14)]~~ "Delivery," with respect to an instrument, document ~~[instruments, documents]~~ of title, or chattel paper, ~~[or certificated securities]~~ means voluntary transfer of possession.

(16) ~~[(15)]~~ "Document of title" includes bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers. To be a document of title a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass.

(17) ~~[(16)]~~ "Fault" means a default, breach, or wrongful act or ~~[,]~~ omission ~~[or breach]~~.

(18) ~~[(17)]~~ "Fungible"~~["with respect to"]~~ goods~~["or securities"]~~ means:

(A) goods ~~[or securities]~~ of which any unit ~~[is]~~, by nature or usage of trade, is the equivalent of any other like unit; or

(B) goods that by agreement~~["— Goods which are not fungible shall be deemed fungible for the purposes of this title to the extent that under a particular agreement or document unlike units"]~~ are treated as equivalent ~~[equivalents]~~.

(19) ~~[(18)]~~ "Genuine" means free of forgery or counterfeiting.

(20) ~~[(19)]~~ "Good faith," except as otherwise provided in Chapter 5, means honesty in fact and the observance of reasonable commercial standards of fair dealing ~~[in the conduct or transaction concerned]~~.

(21) ~~[(20)]~~ "Holder" ~~[with respect to a negotiable instrument]~~ means:

(A) the person in possession of a negotiable ~~[if the]~~ instrument that is payable either to bearer or ~~[, in the case of an instrument payable]~~ to an identified person that is ~~[, if]~~ the ~~[identified]~~ person ~~[is]~~ in possession; or

(B) ~~["— "Holder" with respect to a document of title means]~~ the person in possession of a document of title if the goods are deliverable either to bearer or to the order of the person in

possession.

~~[(21) To "honor" is to pay or to accept and pay, or where a credit so engages to purchase or discount a draft complying with the terms of the credit.]~~

(22) "Insolvency proceeding ~~[proceedings]~~" includes an ~~[any]~~ assignment for the benefit of creditors or other proceeding ~~[proceedings]~~ intended to liquidate or rehabilitate the estate of the person involved.

(23) "Insolvent" means:

~~(A) having generally [A person is "insolvent" who either has] ceased to pay [his] debts in the ordinary course of business other than as a result of a bona fide dispute;~~

~~(B) being unable to [or cannot] pay [his] debts as they become due; or~~

~~(C) being [is] insolvent within the meaning of the federal bankruptcy law.~~

(24) "Money" means a medium of exchange currently authorized or adopted by a domestic or foreign government. The term ~~[and]~~ includes a monetary unit of account established by an intergovernmental organization or by agreement between two or more countries ~~[nations]~~.

(25) ~~[A person has "notice" of a fact when~~

~~[(A) he has actual knowledge of it, or~~

~~[(B) he has received a notice or notification of it, or~~

~~[(C) from all the facts and circumstances known to him at the time in question he has reason to know that it exists.~~

~~[A person "knows" or has "knowledge" of a fact when he has actual knowledge of it. "Discover" or "learn" or a word or phrase of similar import refers to knowledge rather than to reason to know. The time and circumstances under which a notice or notification may cease to be effective are not determined by this title.~~

~~[(26) A person "notifies" or "gives" a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it. A person "receives" a notice or notification when~~

~~[(A) it comes to his attention; or~~

~~[(B) it is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications.~~

~~[(27) Notice, knowledge or a notice or notification received by an organization is effective for a particular transaction from the time when it is brought to the attention of the individual conducting that transaction, and in any event from the time when it would have been brought to his attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless such communication is part of his regular duties or unless he has reason to know of the transaction and that the transaction would be materially affected by the information.~~

~~[(28)] "Organization" means a person other than an individual [includes a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal or commercial entity].~~

~~(26) [(29)] "Party," [7] as distinguished [distinct] from "third party," [7] means a person that [who] has engaged in a transaction or made an agreement subject to [within] this title.~~

~~(27) [(30)] "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity [includes an~~

~~individual or an organization (See Section 1.102)].~~

(28) "Present value" means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain by use of either an interest rate specified by the parties if that rate is not manifestly unreasonable at the time the transaction is entered into or, if an interest rate is not so specified, a commercially reasonable rate that takes into account the facts and circumstances at the time the transaction is entered into.

~~(29) [(31) "Presumption" or "presumed" means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its non-existence.~~

~~[(32)] "Purchase" means [includes] taking by sale, lease, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift, or any other voluntary transaction creating an interest in property.~~

(30) ~~[(33)]~~ "Purchaser" means a person that ~~[who]~~ takes by purchase.

(31) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

~~(32) [(34)]~~ "Remedy" means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal.

~~(33) [(35)] "Representative" means a [includes an agent, an officer of a corporation or association, and a trustee, executor or administrator of an estate, or any other] person empowered to act for another, including an agent, an officer of a corporation or association, and a trustee, executor, or administrator of an estate.~~

(34) "Right" ~~[(36) "Rights"]~~ includes remedy ~~[remedies].~~

(35) ~~[(37)(A)]~~ "Security interest" means an interest in personal property or fixtures which ~~[that]~~ secures payment or performance of an obligation. "Security interest" ~~[The term also]~~ includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to Chapter 9. "Security interest" does not include the [The] special property interest of a buyer of goods on identification of those [such] goods to a contract for sale under Section 2.401 [is not a "security interest"], but a buyer may also acquire a "security interest" by complying with Chapter 9. Except as otherwise provided in Section 2.505, the right of a seller or lessor of goods under Chapter 2 or 2A to retain or acquire possession of the goods is not a "security interest," [7] but a seller or lessor may also acquire a "security interest" by complying with Chapter 9. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer under [4]Section 2.401[+] is limited in effect to a reservation of a "security interest." [7]

~~[(B)] Whether a transaction in the form of a lease creates a [lease or] security interest is determined pursuant to Section 1.203 [by the facts of each case, however, a transaction creates a security interest if the consideration the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee, and:~~

~~[(i) the original term of the lease is equal to or greater than the remaining economic life of the goods,~~

~~[(ii) the lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods,~~

~~[(iii) the lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement, or~~

~~[(iv) the lessee has an option to become the owner of the goods for no additional consideration or nominal~~

additional consideration upon compliance with the lease agreement.
~~[(C) A transaction does not create a security interest merely because it provides that:~~

~~[(i) the present value of the consideration the lessee is obligated to pay the lessor for the right to possession and use of the goods is substantially equal to or is greater than the fair market value of the goods at the time the lease is entered into;~~

~~[(ii) the lessee assumes risk of loss of the goods or agrees to pay taxes, insurance, filing, recording, or registration fees or service or maintenance costs with respect to the goods;~~

~~[(iii) the lessee has an option to renew the lease or to become the owner of the goods;~~

~~[(iv) the lessee has an option to renew the lease for a fixed rent that is equal to or greater than the reasonably predictable fair market rent for the use of the goods for the term of the renewal at the time the option is to be performed; or~~

~~[(v) the lessee has an option to become the owner of the goods for a fixed price that is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed.~~

~~[(D) For the purposes of this subdivision, additional consideration is nominal if it is less than the lessee's reasonably predictable cost of performing under the lease agreement if the option is not exercised. Additional consideration is not nominal if:~~

~~[(i) when the option to renew the lease is granted to the lessee, the rent is stated to be the fair market rent for the use of the goods for the term of the renewal determined at the time the option is to be performed; or~~

~~[(ii) when the option to become the owner of the goods is granted to the lessee, the price is stated to be the fair market value of the goods determined at the time the option is to be performed.~~

~~[(E) For the purposes of this subdivision, "reasonably predictable" and "remaining economic life of the goods" are to be determined with reference to the facts and circumstances at the time the transaction is entered into.~~

~~[(F) For the purposes of this subdivision, "present value" means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain. The discount is determined by the interest rate specified by the parties if the rate is not manifestly unreasonable at the time the transaction is entered into. Otherwise, the discount is determined by a commercially reasonable rate that takes into account the facts and circumstances of each case at the time the transaction was entered into].~~

(36) [(38)] "Send" in connection with a [any] writing, record, or notice means:

(A) to deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and, in the case of an instrument, to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances; or

(B) in any other way cause to be received any record[. The receipt of any writing] or notice within the time at which it would have arrived if properly sent [has the effect of a proper sending].

(37) [(39)] "Signed" includes using any symbol executed or adopted [by a party] with present intention to adopt or accept [authenticate] a writing.

(38) "State" means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(39) [(40)] "Surety" includes a guarantor or other

secondary obligor.

~~(40) [(41) "Telegram" includes a message transmitted by radio, teletype, cable, any mechanical method of transmission, or the like.~~

~~[(42)] "Term" means a [that] portion of an agreement that [which] relates to a particular matter.~~

~~(41) [(43)] "Unauthorized[" signature" means a signature [one] made without actual, implied, or apparent authority. The term [and] includes a forgery.~~

~~(42) [(44)] "Value". Except as otherwise provided with respect to negotiable instruments and bank collections (Sections 3.303, 4.210, and 4.211) a person gives "value" for rights if he acquires them:~~

~~[(A) in return for a binding commitment to extend credit or for the extension of immediately available credit whether or not drawn upon and whether or not a charge-back is provided for in the event of difficulties in collection;~~

~~[(B) as security for or in total or partial satisfaction of a pre-existing claim;~~

~~[(C) by accepting delivery pursuant to a pre-existing contract for purchase; or~~

~~[(D) generally, in return for any consideration sufficient to support a simple contract.~~

~~[(45)] "Warehouse receipt" means a receipt issued by a person engaged in the business of storing goods for hire.~~

~~(43) "Writing" [(46) "Written" or "writing"] includes printing, typewriting, or any other intentional reduction to tangible form. "Written" has a corresponding meaning.~~

~~Sec. 1.202. NOTICE; KNOWLEDGE. (a) Subject to Subsection (f), a person has "notice" of a fact if the person:~~

~~(1) has actual knowledge of it;~~
~~(2) has received a notice or notification of it; or~~
~~(3) from all the facts and circumstances known to the person at the time in question, has reason to know that it exists.~~

~~(b) "Knowledge" means actual knowledge. "Knows" has a corresponding meaning.~~

~~(c) "Discover," "learn," or words of similar import refer to knowledge rather than to reason to know.~~

~~(d) A person "notifies" or "gives" a notice or notification to another person by taking such steps as may be reasonably required to inform the other person in ordinary course, whether or not the other person actually comes to know of it.~~

~~(e) Subject to Subsection (f), a person "receives" a notice or notification when:~~

~~(1) it comes to that person's attention; or~~
~~(2) it is duly delivered in a form reasonable under the circumstances at the place of business through which the contract was made or at another location held out by that person as the place for receipt of such communications.~~

~~(f) Notice, knowledge, or a notice or notification received by an organization is effective for a particular transaction from the time it is brought to the attention of the individual conducting that transaction and, in any event, from the time it would have been brought to the individual's attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless the communication is part of the individual's regular duties or the individual has reason to know of the transaction and that the transaction would be materially affected by the information. [PRIMA FACIE EVIDENCE BY THIRD PARTY DOCUMENTS. A document in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher's or inspector's certificate, consular invoice, or any other document authorized or required by the contract to be issued by a third party shall be prima facie evidence of its own authenticity and genuineness and of the facts stated in the document by the third~~

party.]

Sec. 1.203. LEASE DISTINGUISHED FROM SECURITY INTEREST.
 (a) Whether a transaction in the form of a lease creates a lease or security interest is determined by the facts of each case.

(b) A transaction in the form of a lease creates a security interest if the consideration that the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease and is not subject to termination by the lessee, and:

(1) the original term of the lease is equal to or greater than the remaining economic life of the goods;

(2) the lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods;

(3) the lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement; or

(4) the lessee has an option to become the owner of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement.

(c) A transaction in the form of a lease does not create a security interest merely because:

(1) the present value of the consideration the lessee is obligated to pay the lessor for the right to possession and use of the goods is substantially equal to or is greater than the fair market value of the goods at the time the lease is entered into;

(2) the lessee assumes risk of loss of the goods;

(3) the lessee agrees to pay, with respect to the goods, taxes, insurance, filing, recording, or registration fees, or service or maintenance costs;

(4) the lessee has an option to renew the lease or to become the owner of the goods;

(5) the lessee has an option to renew the lease for a fixed rent that is equal to or greater than the reasonably predictable fair market rent for the use of the goods for the term of the renewal at the time the option is to be performed; or

(6) the lessee has an option to become the owner of the goods for a fixed price that is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed.

(d) Additional consideration is nominal if it is less than the lessee's reasonably predictable cost of performing under the lease agreement if the option is not exercised. Additional consideration is not nominal if:

(1) when the option to renew the lease is granted to the lessee, the rent is stated to be the fair market rent for the use of the goods for the term of the renewal determined at the time the option is to be performed; or

(2) when the option to become the owner of the goods is granted to the lessee, the price is stated to be the fair market value of the goods determined at the time the option is to be performed.

(e) The "remaining economic life of the goods" and "reasonably predictable" fair market rent, fair market value, or cost of performing under the lease agreement must be determined with reference to the facts and circumstances at the time the transaction is entered into. [OBLIGATION OF GOOD FAITH. Every contract or duty within this title imposes an obligation of good faith in its performance or enforcement.]

Sec. 1.204. VALUE. Except as otherwise provided in Chapters 3, 4, and 5, a person gives value for rights if the person acquires them:

(1) in return for a binding commitment to extend credit or for the extension of immediately available credit, whether or not drawn upon and whether or not a charge-back is provided for in the event of difficulties in collection;

(2) as security for, or in total or partial satisfaction of, a preexisting claim;

(3) by accepting delivery under a preexisting contract for purchase; or

(4) in return for any consideration sufficient to support a simple contract.

Sec. 1.205. ~~[TIME,]~~ REASONABLE TIME; SEASONABLENESS. ~~["SEASONABLY."] (a) Whether a time for taking an action required by this title is reasonable [Whenever this title requires any action to be taken within a reasonable time, any time which is not manifestly unreasonable may be fixed by agreement.~~

~~[(b) What is a reasonable time for taking any action] depends on the nature, purpose, and circumstances of the [such] action.~~

(b) ~~[(c)]~~ An action is taken seasonably if ~~["seasonably" when] it is taken at or within the time agreed or, if no time is agreed, at or within a reasonable time.~~

Sec. 1.206. PRESUMPTIONS. Whenever this title creates a "presumption" with respect to a fact, or provides that a fact is "presumed," the trier of fact must find the existence of the fact unless and until evidence is introduced that supports a finding of its nonexistence.

SUBCHAPTER C. TERRITORIAL APPLICABILITY AND GENERAL RULES

Sec. 1.301. TERRITORIAL APPLICATION OF THE TITLE; PARTIES' POWER TO CHOOSE APPLICABLE LAW. (a) Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this title applies to transactions bearing an appropriate relation to this state.

(b) Where one of the following provisions of this title specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified:

Rights of creditors against sold goods. Section 2.402.

Applicability of the chapter on Leases. Sections 2A.105 and 2A.106.

Applicability of the chapter on Bank Deposits and Collections. Section 4.102.

Governing law in the chapter on Funds Transfers. Section 4A.507.

Letters of Credit. Section 5.116.

Applicability of the chapter on Investment Securities. Section 8.110.

Law governing perfection, the effect of perfection or nonperfection, and the priority of security interests and agricultural liens. Sections 9.301-9.307.

(c) If a transaction that is subject to this title is a "qualified transaction," as defined in Section 35.51 of this code, then except as provided in Subsection (b) of this section, Section 35.51 governs the effect of an agreement by the parties that the law of a particular jurisdiction governs an issue relating to the transaction or that the law of a particular jurisdiction governs the interpretation or construction of an agreement relating to the transaction or a provision of the agreement.

Sec. 1.302. VARIATION BY AGREEMENT. (a) Except as otherwise provided in Subsection (b) or elsewhere in this title, the effect of provisions of this title may be varied by agreement.

(b) The obligations of good faith, diligence, reasonableness, and care prescribed by this title may not be disclaimed by agreement. The parties, by agreement, may determine the standards by which the performance of those obligations is to be measured if those standards are not manifestly unreasonable. Whenever this title requires an action to be taken within a reasonable time, a time that is not manifestly unreasonable may be fixed by agreement.

(c) The presence in certain provisions of this title of the phrase "unless otherwise agreed," or words of similar import, does not imply that the effect of other provisions may not be varied by agreement under this section.

Sec. 1.303. COURSE OF PERFORMANCE, ~~[1.205.]~~ COURSE OF

DEALING, AND USAGE OF TRADE. (a) A "course of performance" is a sequence of conduct between the parties to a particular transaction that exists if:

(1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and

(2) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.

(b) A course of dealing is a sequence of ~~[previous]~~ conduct concerning previous transactions between the parties to a particular transaction that ~~[which]~~ is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(c) ~~[(b)]~~ A "usage of trade" is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage must ~~[are to]~~ be proved as facts. If it is established that such a usage is embodied in a ~~[written]~~ trade code or similar record, ~~[writing]~~ the interpretation of the record is a question of law ~~[writing is for the court]~~.

(d) ~~[(c)]~~ A course of performance or course of dealing between the parties or ~~[and any]~~ usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the ~~[an]~~ agreement. A usage of trade applicable in the place in which part of the performance under the agreement is to occur may be so utilized as to that part of the performance.

(e) Except as otherwise provided in Subsection (f), the ~~[(d)]~~ ~~The~~ express terms of an agreement and any ~~[an]~~ applicable course of performance, course of dealing, or usage of trade must ~~[shall]~~ be construed whenever ~~[wherever]~~ reasonable as consistent with each other. If ~~[, but when]~~ such a construction is unreasonable:

(1) express terms prevail over course of performance, ~~[control both]~~ course of dealing, and usage of trade;

(2) course of performance prevails over course of dealing and usage of trade; and

(3) course of dealing prevails over ~~[controls]~~ usage of trade.

(f) Subject to Section 2.209, a course of performance is relevant to show a waiver or modification of any term inconsistent with the course of performance.

~~[(e)]~~ ~~An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance.~~

~~[(f)]~~ Evidence of a relevant usage of trade offered by one party is not admissible unless that party ~~[and until he]~~ has given the other party ~~[such]~~ notice that ~~[as]~~ the court finds sufficient to prevent unfair surprise to the other party ~~[latter]~~.

Sec. 1.304. OBLIGATION OF GOOD FAITH. Every contract or duty within this title imposes an obligation of good faith in its performance and enforcement.

Sec. 1.305. REMEDIES TO BE LIBERALLY ADMINISTERED. (a) The remedies provided by this title must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special damages nor penal damages may be had except as specifically provided in this title or by other rule of law.

(b) Any right or obligation declared by this title is enforceable by action unless the provision declaring it specifies a different and limited effect.

Sec. 1.306. WAIVER OF RENUNCIATION OF CLAIM OR RIGHT AFTER BREACH. A claim or right arising out of an alleged breach may be discharged in whole or in part without consideration by agreement of the aggrieved party in an authenticated record.

Sec. 1.307. PRIMA FACIE EVIDENCE BY THIRD-PARTY DOCUMENTS.

A document in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher's or inspector's certificate, consular invoice, or any other document authorized or required by the contract to be issued by a third party is prima facie evidence of its own authenticity and genuineness and of the facts stated in the document by the third party.

~~Sec. 1.308 [1.206. STATUTE OF FRAUDS FOR KINDS OF PERSONAL PROPERTY NOT OTHERWISE COVERED. (a) Except in the cases described in Subsection (b) of this section a contract for the sale of personal property is not enforceable by way of action or defense beyond \$5,000 in amount or value of remedy unless there is some writing which indicates that a contract for sale has been made between the parties at a defined or stated price, reasonably identifies the subject matter, and is signed by the party against whom enforcement is sought or by his authorized agent.~~

~~[(b) Subsection (a) of this section does not apply to contracts for the sale of goods (Section 2.201) nor of securities (Section 8.113) nor to security agreements (Section 9.203).~~

~~[Sec. 1.207]. PERFORMANCE OR ACCEPTANCE UNDER RESERVATION OF RIGHTS. (a) A party that [who,] with explicit reservation of rights[,] performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as "without prejudice," [,] "under protest," [,] or the like are sufficient.~~

~~(b) Subsection (a) does not apply to an accord and satisfaction.~~

~~Sec. 1.309 [1.208]. OPTION TO ACCELERATE AT WILL. A term providing that one party or that party's [his] successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or when the party "deems itself ["when he deems himself] insecure," or [in] words of similar import, means [shall be construed to mean] that the party has [he shall have] power to do so only if that party [he] in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against which [whom] the power has been exercised.~~

~~Sec. 1.310. SUBORDINATED OBLIGATIONS. An obligation may be issued as subordinated to performance of another obligation of the person obligated, or a creditor may subordinate its right to performance of an obligation by agreement with either the person obligated or another creditor of the person obligated. Subordination does not create a security interest as against either the common debtor or a subordinated creditor.~~

SECTION 2. Section 2.103(a)(2), Business & Commerce Code, is amended to read as follows:

(2) ~~[Reserved.] ["Good faith" in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.]~~

SECTION 3. Section 2.202, Business & Commerce Code, is amended to read as follows:

Sec. 2.202. FINAL WRITTEN EXPRESSION: PAROL OR EXTRINSIC EVIDENCE. Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(1) by course of performance, course of dealing, or usage of trade (Section 1.303 [1.205]) ~~[or by course of performance (Section 2.208)]~~; and

(2) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

SECTION 4. Section 2A.103(c), Business & Commerce Code, is amended to read as follows:

(c) The following definitions in other chapters apply to this chapter:

"Account". Section 9.102(a)(2).

"Between merchants". Section 2.104(c).

13-1 "Buyer". Section 2.103(a)(1).
 13-2 "Chattel paper". Section 9.102(a)(11).
 13-3 "Consumer goods". Section 9.102(a)(23).
 13-4 "Document". Section 9.102(a)(30).
 13-5 "Entrusting". Section 2.403(c).
 13-6 "General intangible". Section 9.102(a)(42).
 13-7 ~~["Good faith". Section 2.103(a)(2).]~~
 13-8 "Instrument". Section 9.102(a)(47).
 13-9 "Merchant". Section 2.104(a).
 13-10 "Mortgage". Section 9.102(a)(55).
 13-11 "Pursuant to commitment". Section 9.102(a)(69).
 13-12 "Receipt". Section 2.103(a)(3).
 13-13 "Sale". Section 2.106(a).
 13-14 "Sale on approval". Section 2.326.
 13-15 "Sale or return". Section 2.326.
 13-16 "Seller". Section 2.103(a)(4).

13-17 SECTION 5. Section 2A.501(d), Business & Commerce Code, is
 13-18 amended to read as follows:

13-19 (d) Except as otherwise provided by Section 1.305(a)
 13-20 ~~[1.106(a)]~~ or this chapter or the lease agreement, the rights and
 13-21 remedies referred to in Subsections (b) and (c) are cumulative.

13-22 SECTION 6. Section 2A.518(b), Business & Commerce Code, is
 13-23 amended to read as follows:

13-24 (b) Except as otherwise provided with respect to damages
 13-25 liquidated in the lease agreement (Section 2A.504) or otherwise
 13-26 determined pursuant to agreement of the parties (Sections 1.302
 13-27 ~~[1.102(c)]~~ and 2A.503), if a lessee's cover is by a lease agreement
 13-28 substantially similar to the original lease agreement and the new
 13-29 lease agreement is made in good faith and in a commercially
 13-30 reasonable manner, the lessee may recover from the lessor as
 13-31 damages (1) the present value, as of the date of the commencement of
 13-32 the term of the new lease agreement, of the rent under the new lease
 13-33 agreement applicable to that period of the new lease term which is
 13-34 comparable to the then remaining term of the original lease
 13-35 agreement minus the present value as of the same date of the total
 13-36 rent for the then remaining lease term of the original lease
 13-37 agreement, and (2) any incidental or consequential damages, less
 13-38 expenses saved as a consequence of the lessor's default.

13-39 SECTION 7. Section 2A.519(a), Business & Commerce Code, is
 13-40 amended to read as follows:

13-41 (a) Except as otherwise provided with respect to damages
 13-42 liquidated in the lease agreement (Section 2A.504) or otherwise
 13-43 determined pursuant to agreement of the parties (Sections 1.302
 13-44 ~~[1.102(c)]~~ and 2A.503), if a lessee elects not to cover or a lessee
 13-45 elects to cover and the cover is by lease agreement that for any
 13-46 reason does not qualify for treatment under Section 2A.518(b) or is
 13-47 by purchase or otherwise, the measure of damages for nondelivery or
 13-48 repudiation by the lessor or for rejection or revocation of
 13-49 acceptance by the lessee is the present value, as of the date of the
 13-50 default, of the then market rent minus the present value as of the
 13-51 same date of the original rent, computed for the remaining lease
 13-52 term of the original lease agreement, together with incidental and
 13-53 consequential damages, less expenses saved in consequence of the
 13-54 lessor's default.

13-55 SECTION 8. Section 2A.527(b), Business & Commerce Code, is
 13-56 amended to read as follows:

13-57 (b) Except as otherwise provided with respect to damages
 13-58 liquidated in the lease agreement (Section 2A.504) or otherwise
 13-59 determined pursuant to agreement of the parties (Sections 1.302
 13-60 ~~[1.102(c)]~~ and 2A.503), if the disposition is by lease agreement
 13-61 substantially similar to the original lease agreement and the new
 13-62 lease agreement is made in good faith and in a commercially
 13-63 reasonable manner, the lessor may recover from the lessee as
 13-64 damages (1) accrued and unpaid rent as of the date of the
 13-65 commencement of the term of the new lease agreement, (2) the present
 13-66 value, as of the same date, of the total rent for the then remaining
 13-67 lease term of the original lease agreement minus the present value,
 13-68 as of the same date, of the rent under the new lease agreement
 13-69 applicable to that period of the new lease term which is comparable

to the then remaining term of the original lease agreement, and (3) any incidental damages allowed under Section 2A.530, less expenses saved in consequence of the lessee's default.

SECTION 9. Section 2A.528(a), Business & Commerce Code, is amended to read as follows:

(a) Except as otherwise provided with respect to damages liquidated in the lease agreement (Section 2A.504) or otherwise determined pursuant to agreement of the parties (Sections 1.302 [~~1.102(c)~~] and 2A.503), if a lessor elects to retain the goods or a lessor elects to dispose of the goods and the disposition is by lease agreement that for any reason does not qualify for treatment under Section 2A.527(b) or is by sale or otherwise, the lessor may recover from the lessee as damages for a default of the type described in Section 2A.523(a) or (c)(1), or, if agreed, for other default of the lessee, (i) accrued and unpaid rent as of the date of default if the lessee has never taken possession of the goods, or, if the lessee has taken possession of the goods, as of the date the lessor repossesses the goods or an earlier date on which the lessee makes a tender of the goods to the lessor, (ii) the present value as of the date determined under clause (i) of the total rent for the then remaining lease term of the original lease agreement minus the present value as of the same date of the market rent at the place where the goods are located computed for the same lease term, and (iii) any incidental damages allowed under Section 2A.530, less expenses saved in consequence of the lessee's default.

SECTION 10. Sections 3.103(a)(4) and (10), Business & Commerce Code, are amended to read as follows:

(4) [Reserved.] [~~"Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing.~~]

(10) "Prove" with respect to a fact means to meet the burden of establishing the fact (Section 1.201(b)(8) [~~1.201(8)~~]).

SECTION 11. Section 4.102(c), Business & Commerce Code, is amended to read as follows:

(c) Notwithstanding Section 1.301 [~~1.105~~], the laws of this state govern a deposit contract between a bank and a consumer account holder if the branch or separate office of the bank that accepts the deposit contract is located in this state. For purposes of this subsection, "consumer account holder" means a natural person who holds a deposit account primarily for personal, family, or household purposes but does not include a natural person who holds an account for another in a professional capacity.

SECTION 12. Section 4.104(c), Business & Commerce Code, is amended to read as follows:

(c) The following definitions in other chapters apply to this chapter:

"Acceptance"	Section 3.409.
"Alteration"	Section 3.407.
"Cashier's check"	Section 3.104.
"Certificate of deposit"	Section 3.104.
"Certified check"	Section 3.409.
"Check"	Section 3.104.
["Good faith"	Section 3.103.]
"Holder in due course"	Section 3.302.
"Instrument"	Section 3.104.
"Notice of dishonor"	Section 3.503.
"Order"	Section 3.103.
"Ordinary care"	Section 3.103.
"Person entitled to enforce"	Section 3.301.
"Presentment"	Section 3.501.
"Promise"	Section 3.103.
"Prove"	Section 3.103.
"Teller's check"	Section 3.104.
"Unauthorized signature"	Section 3.403.

SECTION 13. Sections 4A.105(a)(6) and (7), Business & Commerce Code, are amended to read as follows:

(6) [Reserved.] [~~"Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing.~~]

(7) "Prove" with respect to a fact means to meet the burden of establishing the fact (Section 1.201(b)(8) [~~1.201(8)~~]).

SECTION 14. Section 4A.106(a), Business & Commerce Code, is amended to read as follows:

(a) The time of receipt of a payment order or communication cancelling or amending a payment order is determined by the rules applicable to receipt of a notice stated in Section 1.202 [~~1.201~~]. A receiving bank may fix a cutoff time or times on a funds transfer business day for the receipt and processing of payment orders and communications cancelling or amending payment orders. Different cutoff times may apply to payment orders, cancellations, or amendments, or to different categories of payment orders, cancellations, or amendments. A cutoff time may apply to senders generally or different cutoff times may apply to different senders or categories of payment orders. If a payment order or communication cancelling or amending a payment order is received after the close of a funds transfer business day or after the appropriate cutoff time on a funds transfer business day, the receiving bank may treat the payment order or communication as received at the opening of the next funds transfer business day.

SECTION 15. Section 4A.204(b), Business & Commerce Code, is amended to read as follows:

(b) Reasonable time under Subsection (a) may be fixed by agreement as stated in Section 1.302(b) [~~1.204~~], but the obligation of a receiving bank to refund payment as stated in Subsection (a) may not otherwise be varied by agreement.

SECTION 16. Section 4A.507(b), Business & Commerce Code, is amended to read as follows:

(b) If the parties described by each subdivision of Subsection (a) have made an agreement selecting the law of a particular jurisdiction to govern rights and obligations between each other, the law of that jurisdiction governs those rights and obligations as to matters of construction and interpretation, whether or not the payment order or the funds transfer bears a reasonable relation to that jurisdiction, and as to validity, to the extent permitted by Section 1.301 [~~1.105~~] of this code.

SECTION 17. Section 5.103(c), Business & Commerce Code, is amended to read as follows:

(c) With the exception of this subsection, Subsections (a) and (d), Sections 5.102(a)(9) and (10), Section 5.106(d), Section 5.110(c), and Section 5.114(d) and except to the extent prohibited in Sections 1.302 [~~1.102(c)~~] and 5.117(d), the effect of this chapter may be varied by agreement or by a provision stated or incorporated by reference in an undertaking. A term in an agreement or undertaking generally excusing liability or generally limiting remedies for failure to perform obligations is not sufficient to vary obligations prescribed by this chapter.

SECTION 18. Section 8.102(a)(10), Business & Commerce Code, is amended to read as follows:

(10) [Reserved.] [~~"Good faith," for purposes of the obligation of good faith in the performance or enforcement of contracts or duties within this chapter, means honesty in fact and the observance of reasonable commercial standards of fair dealing.~~]

SECTION 19. Section 9.102(a)(43), Business & Commerce Code, is amended to read as follows:

(43) [Reserved.] [~~"Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing.~~]

SECTION 20. Sections 2.208 and 2A.207, Business & Commerce Code, are repealed.

SECTION 21. This Act takes effect September 1, 2003.

* * * * *